Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

RAUL PINGOL MERCADO,

Petitioner,

v.

JOHN ASHCROFT, Attorney General of the United States, et al.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S SUPPLEMENTAL APPENDIX

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United States District Court
Central District of California

RAUL PINGOL MERCADO, Petitioner,
v.
JANET RENO, et al., Respondents.

No. CV-00-11430-MMM (MAN)

JUDGMENT

Filed June 25, 2003
Entered June 25, 2003

Pursuant to the Order Accepting and Adopting Findings, Conclusions, and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that this action is dismissed with prejudice.

Dated: June 24, 2003.

(Signed) Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

United States District Court
Central District of California

RAUL PINGOL MERCADO, Petitioner,
v.
JANET RENO, et al., Respondents.

No. CV-00-11430-MMM (MAN)

ORDER ACCEPTING AND ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Filed June 25, 2003
Entered June 25, 2003

Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court has reviewed the First Amended Petition, all of the records and files herein, the Amended Report and Recommendation of United States Magistrate Judge, and Petitioner's Objections. The Court has conducted a *de novo* review of those matters to which Objections have been made. The Court accepts and adopts the Magistrate Judge's Amended Report and Recommendation and denies Petitioner's request for a stay of this action, and notes that the United States Court of Appeals for the Ninth Circuit has denied rehearing and review *en banc* of Taniguchi v. Schultz, 303 F.3d 950 (9th Cir. 2002), which is cited in the Amended Report and Recommendation. *See* Taniguchi v. Schultz, ___ F.3d ___, 2003 WL 21397730 (9th Cir. June 18, 2003).

IT IS ORDERED that: (1) the First Amended Petition is DENIED; and (2) Judgment shall be entered dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on counsel for petitioner and counsel for respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: June 24, 2003

(Signed) Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

United States District Court
Central District of California

RAUL PINGOL MERCADO, Petitioner,
v.
JANET RENO, et al., Respondents.
No. CV-00-11430-MMM (MAN)

AMENDED REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Filed September 27, 2002

This amended Report and Recommendation is submitted to the Honorable Margaret M. Morrow, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order No. 01-13 of the United States District Court for the Central District of California.

INTRODUCTION

Petitioner, a national of the Philippines, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on October 27, 2000. On January 16, 2001, petitioner filed a First Amended Petition. On March 15, 2001, respondents filed a Return to First Amended Petition. On April 13, 2001, petitioner filed a Traverse.

On May 16, 2001, United States Magistrate Judge Ann I. Jones issued a Report and Recommendation recommending that the petition be dismissed with prejudice.[1]

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[1] On September 20, 2002, this action was transferred
(continued...)

On May 29, 2001, petitioner filed his objections to the Report and Recommendation.

Since that time, the United States Court of Appeals for the Ninth Circuit has issued an opinion in Taniguchi v. Schultz, __ F.3d ___, 2002 WL 31115538 (9th Cir. September 25, 2002, as amended), which is directly controlling as to Petitioner's first claim. Accordingly, the Court issues this Amended Report and Recommendation, analyzing petitioner's first claim in light of Taniguchi. The recommendation that this action be dismissed remains unchanged.

BACKGROUND

Petitioner is a citizen of the Philippines. (Return, Exhibits at 18.) Petitioner entered this country on September 28, 1995, and became a lawful permanent resident on December 1, 1990. (*Id.* at 18, 46.) On December 2, 1996, while employed as a bank manager, petitioner embezzled over $90,000 from the account of a customer. Petitioner later attempted to hide the embezzlement by moving funds from another account and shredding documents. (*Id.* at 21-45.) On November 19, 1999, in a proceeding in this court, United States of America v. Raul Mercado, CR 99-0246-RSWL, petitioner pleaded guilty to the offense of embezzlement in violation of 18 U.S.C. §§ 2 and 656. (*Id.*) He received a sentence of one year and one day. (*Id.*)

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[1](...continued)
for pre-pretrial (sic) purposes to United States Magistrate Judge Margaret A. Nagle.

On January 24, 2000, the Immigration and Naturalization Service ("INS") issued petitioner a Notice to Appeal, charging that petitioner should be removed from this country because he had been convicted of an "aggravated felony" pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). (*Id.* at 47.) Petitioner disputed removability and sought adjustment of status. On July 6, 2000, the immigration judge ("IJ") sustained the charge of removability. (*Id.* at 50.) The INS moved to pretermit petitioner's application for relief, and the parties briefed the issue of whether, despite his conviction, petitioner was statutorily eligible for a waiver pursuant to section 212(h) of the Immigration and Nationality Act ("INA"). (*Id.*) On August 24, 2000, the IJ pretermitted petitioner's application for relief and ordered him removed from the United States to the Philippines.

By notice of appeal dated September 21, 2000, petitioner sought review of the IJ's decision before the Board of Immigration Appeals ("BIA"). (*Id.* at 52.) On February 26, 2001, the BIA dismissed petitioner's appeal. (Traverse, Ex. A.)

On November 22, 2000, petitioner finished serving his sentence, and was released from the custody of the Bureau of Prisons to the custody of the INS. (Return at 4.)

PETITIONER'S CONTENTIONS

Petitioner raises the following claims:

1. INA § 212(h) violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. The mandatory detention provisions of INA § 236(c) are unconstitutional as applied to petitioner.

DISCUSSION

A. INA § 212(h) Does Not Violate Petitioner's Equal Protection Rights.

Petitioner contends that his equal protection rights under the Fifth Amendment have been violated because, as a legal permanent resident ("LPR") convicted of an aggravated felony, he is ineligible to apply for a waiver of inadmissibility under INA § 212(h), whereas aliens who are not legal permanent residents ("non-LPRs") are eligible for section 212(h) relief even if they are convicted of aggravated felonies. (First Amended Petition at 9-16.)

Under 212(h), 8 U.S.C. § 1182(h), the Attorney General has the discretion to waive criminal grounds of inadmissibility in certain cases. The Attorney General may issue waivers to persons subject to removal due to their commission of certain crimes in the following instances:

> (1) . . . (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son or daughter of such alien; and

> (2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulation prescribe, has consented to the alien's applying for or reapplying for a visa, for admission to the United States, or adjustment of status.

8 U.S.C. § 1182(h)

However, under the amendments made by section 348(a) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), section 212(h) further provides that "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" is ineligible for section 212(h) relief if "since the date of such admission the alien has been convicted of an aggravated felony." 8 U.S.C. § 1182(h). The BIA has interpreted this limitation to apply only to LPRs. *See* In re Michael, BIA Int. Dec. 3355, 1998 WL 40407 (BIA 1998) (section 212(h) relief available for non-LPR). Thus, while an LPR convicted of an aggravated felony cannot receive 212(h) relief, a non-LPR convicted of the same offense can.

The Fifth Amendment's constitutional guarantee of equal protection under the law applies to aliens as well as citizens. Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-73 (1886). The Fifth Amendment requires the Government to treat similarly situated individuals similarly. Abboud v. INS, 140 F.3d 843, 847 (9th Cir. 1998). However, Congress's power over the exclusion and expulsion of aliens is very broad. Fiallo v. Bell, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478 (1977); *see* Kleindienst v. Mandel, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583 (1972) ("Over no conceivable subject is the legislative power of Congress more complete

than it is over the admission of aliens."). Congress may determine that certain classes of aliens are more likely than others to satisfy national objectives without undue costs, and it may grant preferential status to those aliens. Fiallo, 430 U.S. at 796 n. 6, 97 S.Ct. at 1479 n. 6. A statute that limits relief available to a certain class of aliens is "valid unless wholly irrational." Taniguchi, 2002 WL 31115538 at *6 (quoting Perez-Oropeza v. INS, 56 F.3d 43, 45 (9th Cir. 1995) (internal quotations marks omitted)). Such a statute must be upheld against an equal protection challenge "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Heller v. Doe, 509 U.S. 312, 319, 113 S.Ct. 2637, 2642 (1993).

In Taniguchi, the Ninth Circuit held that a rational basis exists for denying section 212(h) relief to aggravated felon LPRs but not to aggravated felons non-LPRs. 2002 WL 31115538 at *6-*7. The Ninth Circuit expressed its agreement on this issue with the Seventh and Eleventh Circuits in Moore v. Ashcroft, 251 F.3d 919 (11th Cir. 2001), and Lara-Ruiz v. INS, 241 F.3d 934 (7th Cir. 2001), which had rejected equal protection challenges to section 212(h). [2] The Ninth Circuit reasoned that, because LPRs enjoy substantial rights and privileges not shared by other aliens, it is proper to hold them to a higher standard and level of responsibility than non-LPRs. Taniguchi, 2002 WL

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[2] Other Courts of Appeal that have addressed this issue have also held that the distinction between LPRs and other aliens with respect to section 212(h) relief does not violate the Fifth Amendment's equal protection guarantee. *See* Jankowski-Burczyk v. INS, 291 F.3d 172 (2d Cir. 2002); Lukowski v. INS, 279 F.3d 644 (9th Cir. 2002); *see also* De Leon-Reynoso v. Ashcroft, 293 F.3d 633 (3rd Cir. 2002).

31115538 at *6. Furthermore, as LPRs generally have stronger ties to this country through family and employment relationships, LPRs convicted of aggravated felonies have demonstrated that these ties are insufficient to deter them from crime. *Id.* Thus, Congress could have reasoned that aggravated felon LPRs pose a higher risk of recidivism than non-LPRs, who did not have the benefits of legal permanent resident status to deter them from criminal conduct. *Id.* "Accordingly, aggravated felon LPRs could be viewed as less deserving of a second chance than non-LPRs." *Id.* (internal quotation marks omitted). *Accord* Moore, 252 F.3d at 925; Lara-Ruiz, 241 F.3d at 947-48.

The Ninth Circuit also noted that one of the purposes of Congress in enacting IIRIRA was to expedite the removal of criminal aliens from the United States. Taniguchi, 2002 WL 31115538 at *6; see S. Rep. No. 104-249 at 2 (1996). If an LPR removable as an aggravated felon were eligible for a waiver of inadmissibility, he might apply to adjust his status and, through a legal fiction, obtain "readmission" to the United States as an LPR. This would subvert Congress's intent to make him immediately removable. Taniguchi, 2002 WL 31115538 at *6; Lara-Ruiz, 241 F.3d at 947. The elimination of section 212(h) relief effectively bars aggravated felons from applying to adjust their status while still in the United States. Taniguchi, 2002 WL 31115538 at *6. It has, therefore, eliminated one source of delay in their removal. Lara-Ruiz, 241 F.3d at 947.

The Ninth Circuit further observed that, although it might seem "wiser, fairer, and more efficacious" for Congress to have eliminated section 212(h) relief for non-LPR as well as LPR aggravated felons, the statute was rational a step toward the expeditious removal of aliens who

have committed serious crimes. Taniguchi, 2002 WL 31115538 at *6; Moore, 251 F.3d at 923; Lara-Ruiz, 241 F.3d at 948. Congress may constitutionally adopt legislative reforms "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical of Okla., Inc., 348 U.S 483, 489, 75 S.Ct. 461, 465 (1955). Equal protection does not require "that all evils of the same genus be eradicated or none at all." Railway Express Agency, Inc. v. New York , 336 U.S. 106, 110, 69 S. Ct. 463, 465 (1949).

The Ninth Circuit's holding in Taniguchi binds the Court in this case. Under controlling Ninth Circuit authority, the difference in treatment between LPR and non-LPR aggravated felons with respect to their eligibility for section 212(h) relief does not violate the Fifth Amendment's equal protection guarantee. Accordingly, petitioner's first claim must be dismissed.

B. Petitioner No Longer Falls Within the Provisions of Section 236(c) And Cannot Challenge Its Constitutionality.

In his second claim, petitioner contends that the mandatory detention provisions of INA § 236(c) are unconstitutional as applied to him.[3] (First Amended Petition at 16-19).

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[3] The Ninth Circuit has held that the mandatory detention provisions of section 236(c) are unconstitutional as applied to LPRs. Kim v. Ziglar, 276 F.3d 523 (9th Cir.), *cert. granted*, 122 S. Ct. 2696 (2002).

Petitioner cannot assert a constitutional challenge to section 236(c) because its mandatory detention provisions no longer apply to him. Section 236 of the INA covers detention "pending a decision on whether the alien is to be removed from the United States." INA § 236(a), 8 U.S.C. § 1226(a). Section 241(a) of the INA covers detention of aliens who are subject to final orders of removal. INA § 241(a), 8 U.S.C. § 1231(a).

Petitioner was subject to the provisions of section 236(c) pending the final administrative decision regarding his removability. However, once petitioner's removal order was issued and became final, petitioner was no longer subject to the provisions of section 236(c). Petitioner's removal order became administratively final on February 26, 2001, when the BIA issued a decision dismissing his appeal. (Traverse, Ex. A). See 8 C.F.R. § 241.1. Petitioner, therefore, is currently being detained pursuant to the provisions of section 241(a).

Because petitioner no longer falls within the provisions of section 236(c), he cannot challenge the constitutionality of its mandatory detention provisions. Petitioner's second claim for relief, therefore, must be dismissed.

RECOMMENDATION

For all the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Amended Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the petition with prejudice.

DATED: September 27, 2002.

(Signed) Margaret A. Nagle
MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of judgment of the District Court.